

**STATE OF NEW JERSEY**

***Board of Public Utilities***

*Two Gateway Center*

*Newark, NJ 07102*

**ENERGY**

IN THE MATTER OF THE PETITION OF )  
NRG ENERGY, INC. FOR APPROVAL )  
UNDER SECTION 32 OF THE PUBLIC )  
UTILITY HOLDING COMPANY ACT OF )  
THE PURCHASE OF CERTAIN FOSSIL )  
GENERATION ASSETS FROM )  
SUBSIDIARIES OF FIRSTENERGY )  
CORPORATION )

ORDER OF APPROVAL

DOCKET NO. EM02020113

(SERVICE LIST ATTACHED)

BY THE BOARD:

By petition dated February 26, 2002, NRG Energy, Inc. ("NRG") is requesting a determination by the Board of Public Utilities ("Board") that allowing the Ashtabula Power Station ("Ashtabula"), the Eastlake Power Station ("Eastlake"), the Lakeshore Power Station ("Lakeshore") and the Bay Shore Power Station ("Bay Shore") (collectively, "Fossil Assets") to be "eligible facilities" pursuant to Section 32 of the Public Utility Holding Company Act of 1935 ("PUHCA") will benefit consumers, is in the public interest and does not violate New Jersey law. A copy of the petition was served upon the Division of the Ratepayer Advocate ("Advocate").

According to the petition, NRG is an independent power producer owning 27,831 megawatts ("MW") of generation capacity in operation or advanced development throughout the United States. NRG currently owns 1,211 MW of fossil generation capacity in the PJM Interconnection LLC ("PJM"), which it acquired from Delmarva Power and Light Company in 2001. NRG had also contracted to purchase 793 MW of fossil generation capacity from Atlantic City Electric Company ("ACE"), which transaction was approved by Board Order dated February 20, 2002, In the Matter of Atlantic City Electric Company Regarding the Sale of Certain Fossil Assets, Docket No. EM00020106. On April 1, 2002, both NRG and Conectiv publicly announced that the proposed sale had been terminated by NRG.

NRG asserts that, on November 29, 2001, NRG Able Acquisition LLC, a subsidiary of NRG, entered into a purchase and sale agreement with Cleveland Electric Illuminating ("CEI"), a subsidiary of FirstEnergy Corp. ("FirstEnergy"), for the purchase of all interests of CEI and affiliated entities in Ashtabula, Eastlake and Lakeshore. NRG asserts that, on the same date, NRG also entered into a purchase and sale agreement with Toledo Edison Company ("TE") and FirstEnergy Ventures ("FEV"), both subsidiaries of FirstEnergy, for the purchase of all interests of TE, FEV and affiliated entities in Bay Shore. According to NRG, the Fossil Assets are comprised of coke, coal, oil and diesel units located in Ohio, with a total generation capacity of 2,480 MW.

NRG asserts that it intends to operate the Fossil Assets through a subsidiary that will be an exempt

wholesale generator (“EWG”) under PUHCA. As a condition precedent to the sale, NRG must file an application with the Federal Energy Regulatory Commission (“FERC”) for a determination of its status as an EWG, which will exempt NRG from regulation under PUHCA. A condition precedent to such a finding by FERC is the receipt of specific eligible facility determinations by all affected state public utility regulatory commissions, which include New Jersey, New York, Ohio and Pennsylvania.

In accordance with Section 32(c) of PUHCA, NRG must obtain a specific determination from this Board that allowing the Fossil Assets to be eligible facilities will benefit New Jersey consumers, is in the public interest and does not violate New Jersey law. Under Section 32 of PUHCA, to qualify for EWG status, EWGs must be exclusively engaged in the business of owning or operating eligible facilities, as defined therein. Specifically, in order for the Fossil Assets to be considered an eligible facilities under Section 32 of PUHCA:

(c)...every State commission having jurisdiction over any such rate or charge must make a specific determination that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law; [p]rovided, [t]hat in the case of such a rate or charge which is a rate or charge of an affiliate of a registered holding company:

(A) such determination with respect to the facility in question shall be required from every State commission having jurisdiction over the retail rates and charges of the affiliates of such registered holding company . . . .[15 U.S.C. §79z-5a(c)]

NRG asserts that its request for an eligible facility determination is being made in New Jersey because Jersey Central Power & Light Company (“JCP&L”) is a wholly owned subsidiary of FirstEnergy which, in turn, is a registered holding company under PUHCA. Because the Board has jurisdiction over the retail rates of JCP&L, NRG asserts that the Board must make a determination regarding the eligible facility status of the Fossil Assets pursuant to the requirement of section 32(c) of PUHCA.

NRG asserts that the Fossil Assets have not been used to provide retail electric utility service in New Jersey and that JCP&L has no ownership interest in any of the Fossil Assets. NRG asserts that, pursuant to a transitional power supply agreement, approximately 90% of the capacity and energy of the Fossil Assets is committed to FirstEnergy Solutions Corp., a subsidiary of FirstEnergy, until December 31, 2005. NRG further asserts that approximately 250 MW of the capacity and energy of the Fossil Assets are currently available for sale into the PJM service area. NRG asserts that FirstEnergy currently controls the Fossil Assets through CEI and TE and that, upon transfer to NRG’s subsidiary, the Fossil Assets will be under the control of an independent power producer which already owns and/or is under contract to acquire no more than 2,004 MW, less than 4% of the installed capacity in the PJM service area.<sup>1</sup> NRG asserts that its acquisition of the Fossil Assets will enhance competition in the market for capacity and energy in New Jersey and elsewhere in the PJM service area and, therefore, is beneficial to consumers and in the public interest.

NRG submitted an affidavit, signed by F. Reed Wills, Vice President, Mid-Atlantic Region, of NRG

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<sup>1</sup> As noted above, the sale of ACE’s fossil generation capacity to NRG, in the amount of 793 MW, has since been terminated by NRG.

North America, a subsidiary of NRG, dated April 17, 2002, wherein he certifies:

“The market for electricity capacity and energy within the PJM service area is geographically widespread and generally unconcentrated. Moreover, the Ohio Assets are currently owned by subsidiaries of FirstEnergy, which also owns, through other subsidiaries, significant generating capacity in the PJM service area. NRG, on the other hand, owns de minimus generating capacity within the PJM service area, and it owns no transmission assets within the PJM service area. The acquisitions of the Ohio Assets by NRG will therefore raise no horizontal or vertical market power concerns. On the contrary, it will enhance competition in the supply of electric generating capacity and energy in the PJM service area through the dispersal of the ownership of generating capacity available to supply the PJM service area.”

Mr. Wills asserts that, since the date of the petition, NRG and ACE agreed that the purchase of the 793 MW of fossil generation capacity currently owned by ACE would not be consummated. Mr. Wills asserts that NRG therefore owns only 1,211 MW of capacity in the PJM service area that it acquired from Delmarva in 2001. Mr. Wills also confirms that approximately 90% of the output of the Fossil Assets is to be sold to FirstEnergy through December 31, 2005 under a transitional power sales agreement and that approximately 250 MW of capacity and associated energy from the Fossil Assets will be available for sale within the PJM service area. Mr. Wills asserts that the additional 250 MW of capacity from the acquisition of the Fossil Assets is outside the PJM service area but that it will be available for sale into the PJM service area depending upon market conditions and transmission constraints. Mr. Wills lastly asserts that, as of December 31, 2001, the installed capacity in the PJM service area is 59,350 MW, of which the combined capacity owned by NRG that is currently available within the PJM service area is 1,211 MW,<sup>2</sup> less than 2.5% of the PJM installed capacity.

### Discussion and Findings

For the reasons described above, NRG has requested that this Board make a specific determination that allowing the Fossil Assets to be “eligible facilities” pursuant to Section 32 of PUHCA will benefit consumers, is in the public interest and does not violate New Jersey law. Pursuant to Section 32(c)(A) of PUHCA, it appears that such a finding is required of this Board in order for the Fossil Assets to be considered eligible facilities under federal law, notwithstanding the fact that JCP&L does not hold any ownership interest in the Fossil Assets and that no costs or expenses related to the Fossil Assets are currently, or ever have been, reflected in JCP&L’s rates.

Having reviewed the petition in this matter, and having reviewed the affidavit provided by NRG, it appears that the sale of the Fossil Assets to NRG will not adversely affect either the availability or reliability of electric supply to JCP&L’s customers and that reasonable generation asset divestiture should enhance the availability of competitive energy supplies in the northeast.

Based on the affidavit submitted by NRG, it does not appear that this transaction raises any significant generation or transmission market power issues within the State of New Jersey or PJM. The Board further notes that no entity has opposed the Petitioners’ request.

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<sup>2</sup> The affidavit contained a typographical error, in which the capacity was stated as being 1,261 MW.

Therefore, for the reasons stated, the Board HEREBY DETERMINES that allowing the Fossil Assets to be eligible facilities pursuant to Section 32 of PUHCA will benefit New Jersey consumers, is in the public interest and does not violate State law. The Board is aware that the State of New Jersey has intervened in a federal lawsuit against owners of certain coal-fired generation facilities in other states, including Ohio. United States of America v. American Electric Power Service Corp., et al., Civil Action Nos. C2-99-1182 and C2-99-1250. The Board's determination in this matter shall not be construed to waive or diminish in any way the State of New Jersey's legal rights, claims and/or factual assertions in any present or future litigation.

The Board's determination is based on the facts of this transaction as they have been presented and shall not be precedential for any such future requests, by this or any other company, for similar determinations for other facilities.

DATED: June 25, 2002

BOARD OF PUBLIC UTILITIES  
BY:

(SIGNED)  
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PRESIDENT

(SIGNED)  
FREDERICK F. BUTLER  
COMMISSIONER

(SIGNED)  
CAROL J. MURPHY  
COMMISSIONER

(SIGNED)  
CONNIE O. HUGHES  
COMMISSIONER

ATTEST: (SIGNED)  
KRISTI IZZO  
SECRETARY

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